



**STATE OF NEW JERSEY**

In the Matter of Jerrold Jacobson,  
Supervisor, Employment and  
Training Programs (PS5725N),  
Department of Labor and Workforce  
Development

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

CSC Docket No. 2018-2992

Bypass Appeal

**ISSUED: NOVEMBER 2, 2018 (JET)**

Jerrold Jacobson appeals the bypass of his name on the Supervisor, Employment and Training Programs (PS5725N), Department of Labor and Workforce Development, eligible list.

The appellant took the promotional examination for Supervisor, Employment and Training Programs (PS5725N), Department of Labor and Workforce Development, achieved a passing score, and was ranked on the subsequent eligible list. The appellant’s name was certified on March 12, 2018 (PS180298). In disposing of the certification, the appointing authority bypassed the appellant, who was tied in the number one ranked eligible on the certification with Deshahn Lawrence, and recorded him as “retained, interested others appointed.” The appointing authority appointed Lawrence<sup>1</sup> effective March 31, 2018.

On appeal to the Civil Service Commission (Commission), the appellant asserts, among other things, that Lawrence’s appointment was not warranted. He argues that, although he and Lawrence were ranked the same, the evaluation of candidates was based solely on the applications and, as such, the appointing authority had the opportunity to appoint candidates on the list at its discretion. The appellant adds that, although he received two certification notices from this

<sup>1</sup> It is noted that Lawrence was provisionally appointed as Supervisor, Employment and Training Programs effective April 15, 2017.

agency dated September 23, 2016 (PS161251) and April 4, 2017 (PS170497),<sup>2</sup> he was not interviewed for the positions.

Additionally, the appellant contends that Lawrence took a leave of absence without explanation in September 2017 and she returned in April 2018. The appellant explains that, while Lawrence was absent, the employees under her supervision had to fend for themselves. In this regard, he states that Lawrence at that time did not complete employee evaluations, failed to conduct meetings, and did not communicate with staff from another department. The appellant alleges that Lawrence lacks content knowledge for the position and she frequently asks for information pertaining to policy and procedures. Moreover, the appellant asserts that he was unreasonably assigned to perform various duties in Lawrence's absence, and his reward was to be unfairly reassigned to a Local One Stop Career Center.

Despite being provided with the opportunity, the appointing authority did not provide a response.

## CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii (known as the Rule of Three) allow an appointing authority to select any of the top three interested eligibles from a promotional list, provided that a veteran does not head the list. As long as that discretion is properly utilized, an appointing authority's discretion will not be overturned. *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant on an eligible list was improper.

In cases of this nature where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the actions is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 436, 445, the Court outlined the burden of proof necessary to establish discriminatory and retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish retaliation by a preponderance of the evidence. Once a *prima facie* case showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-retaliatory reason for the decision. For the reasons set forth below, the appellant has not presented a *prima facie* case in this matter.

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<sup>2</sup> It is noted that the PS161251 and PS170497 certifications were issued for Chief, Employment and Training (PS2303N).

In this matter, the appellant has provided no substantial evidence to show that the bypass was improper. Initially, the appellant has not provided any information to show that he is more qualified than Lawrence. Rather, he essentially states that Lawrence is not qualified. As such, he has not established in any way that he is more qualified than Lawrence to be appointed as Supervisor, Employment and Training Programs. The appellant's mere argument that he ranked the same as Lawrence on the certification is insufficient to show that the appointing authority's selection discretion was abused without showing a direct nexus between the credentials and the position in question. It is within an appointing authority's discretion to choose its selection method, and the record indicates that the candidates were ranked and the appointing authority then selected the candidate it determined was best suited for the position. Although the appellant ranked the same as Lawrence based on his examination score, that fact, by itself, is insufficient to establish that his bypass was improper given the discretion afforded an appointing authority under the Rule of Three. Additionally, the appointing authority's action of appointing Lawrence from the list does not establish that the appellant was improperly bypassed. The appellant's argument that Lawrence is not qualified for the position is not persuasive, as the examination was generated due to Lawrence's provisional service in the position.

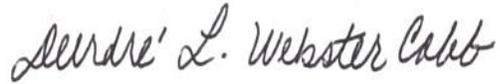
Moreover, the appellant's argument pertaining to the PS161251 and PS170497 certifications are of no moment, as those certifications were issued for a different position, and there is no record that the appellant appealed his non-selection from those certifications to this agency. As such, he cannot now challenge those non-selections within the context of this appeal. With respect to the appellant's argument that he was improperly reassigned, it appears he is arguing that he was retaliated against. However, the appellant has not provided any substantive evidence in support of that claim. The appellant's reassignment to a One Stop Career Center, in and of itself, does not establish that he was subjected to retaliation. Additionally, it was at the appointing authority's discretion to reassign the appellant based on the work needs of the agency. Accordingly, the appellant has not sustained his burden of proof in this matter.

### **ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 31<sup>st</sup> DAY OF OCTOBER, 2018



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